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Nos. 84-518 and 84-710

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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TABLE OF AUTHORITIES

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1. In light of respondents' submission, it seems useful to reiterate the holding of the court of appeals and the issue that has been presented to this Court for review. Relying on a civil service statute that addresses retirement of federal firefighters (5 U.S.C. 8335(b)), the court of appeals held that Congress has established age 55 as a bona fide occupational qualification (BFOQ) for state and local firefighters — *as a matter of law* (Pet. App. 6a-8a). This means that

employers may require their firefighters to retire at age 55 without having to present a scintilla of evidence that such a retirement policy is necessary to the operation of the firefighting department. The question here is whether the federal statutory scheme in fact establishes such a per se BFOQ, which seems to promote age discrimination rather than limit it. That question is purely one of congressional intent.

Accordingly, it must be said that most of respondents' brief is quite beside the point. Respondents make little effort to defend the holding of the court of appeals. Instead, they devote the bulk of their submission (Resp. Br. 16-48) to advancing particular evidence designed to show that mandatory retirement for Baltimore firefighters is good policy and allegedly necessary to the operation of the Baltimore fire department. While this particularized submission is flawed in its own right (see, *e.g.*, note 6, *infra*), its overriding deficiency is that it is completely irrelevant to the question of whether Congress intended to allow mandatory retirement at age 55 of all state and local firefighters in the absence of any evidence regarding the need for such a policy.

What is most remarkable — and illuminating — about respondents' brief is that, in a case that is solely one of statutory interpretation, respondents barely address the language, structure, and pertinent legislative history of the statutes in question. As explained in our opening brief and unrebutted by respondents, the ADEA itself quite clearly demonstrates that age 55 has not been established as a per se BFOQ for state and local firefighters. In the absence of statutory guidance to the contrary, the BFOQ exception is one that requires a factual showing of the necessity for an age limit. See EEOC Br. 17-21. Despite the presence of several explicit exceptions in the ADEA, Congress has not specified an exception for firefighters. And implying such an exception would fly in the face of both the consistent

administrative interpretation of the ADEA and its overriding purpose to eliminate age discrimination. See EEOC Br. 24-27. Moreover, this Court has recognized (*EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.17 (1982); see EEOC Br. 31-32) and the legislative history conclusively demonstrates (see *id.* at. 28-31) that the retention of a statutory provision concerning retirement of federal firefighters — the sole basis for the decision of the court of appeals — was not intended to establish age 55 as a BFOQ for state and local firefighters; indeed, the sponsors specifically stated that this did not reflect approval of mandatory retirement.

2. a. Respondents contend (Br. 4-12) that the 1967 legislative history of the original ADEA supports their contention that age is a BFOQ for firefighters. It is undisputed, of course, that Congress enacted a BFOQ exception; its purpose was to provide a safety valve so that employers would not be absolutely precluded from using age as a basis for making employment decisions where necessary. And the legislative history gives some indication that Congress recognized that hazardous occupations, such as firefighting, were ones where such an exception might be applied. But there can be no doubt that Congress did not establish an across-the-board exception from the ADEA for these occupations. Nothing in the statute can support such an interpretation, and nothing in the legislative history suggests that such was Congress's intent. Rather, Congress plainly contemplated that, even in hazardous occupations, a factual showing of necessity would be required to establish a BFOQ (see EEOC Br. 17-21). And Congress has continued to decline to enact an exception to the ADEA for firefighters and law enforcement officers (see *id.* at 25 n.19). Thus, the ADEA provides no support for the contention that mandatory retirement for firefighters may be justified without any evidentiary showing.

b. Nor does 5 U.S.C. 8335(b) establish age as a BFOQ for state and local firefighters. When the statute was passed, Congress made no findings that would support recognition of age as a BFOQ (see EEOC Br. 36-41), and when the statute was retained in 1978 Congress specifically disclaimed any approval of the mandatory retirement provisions (*id.* at 28-31). Congress's failure in the intervening period to bring the treatment of federal firefighters into conformity with the principles of the ADEA may be ascribable to any of several reasons: (1) inertia and delays in the legislative process; (2) a decision to treat federal employees differently from state employees; or (3) "the ebbs and flows of political decisionmaking" (*EEOC* v. *Wyoming*, 460 U.S. at 243 n.17).[1] What is clear, however, is that Congress's failure to change the treatment of relatively few federal employees was not intended to remove from the purview of the ADEA the considerably larger number of state and local firefighters.[2]

c. In the absence of any statutory support for their position, respondents advance several policy reasons to justify allowing them to retire their employees involuntarily at age 55 without any evidentiary showing that it is necessary to the effective operation of the fire department. They argue that mandatory retirement contributes to the predictability

[1]Legislation recently has been introduced in the House to eliminate mandatory retirement for all federal employees, including firefighters, not presently covered by the ADEA. H.R. 1710, 99th Cong., 1st Sess. (introduced Mar. 25, 1985).

[2]We are informed by the Office of Personnel Management that in 1984, there were about 11,000 civilian federal firefighters. By contrast, in 1983 there were about 310,000 paid state and local firefighters. See Bureau of the Census, U.S. Dep't of Commerce, *Public Employment Report* 3, Table 3 (1983).

of Baltimore's financial planning (Resp. Br. 19-20),[3] that it promotes the safety of the firefighters themselves (*id.* at 17-18, 47-48), that application of the ADEA will lead to more disability payments than contemplated (*id.* at 19), that state and local governments should not be treated differently from the federal government (*id.* at 35-36), and that the ADEA should be directed only at "arbitrary" age discrimination, not at employment practices that are "reasonable" (*id.* at 9-12). The amici supporting respondents urge that application of the ADEA leads to litigation and the possibility of disparate results in neighboring communities (Vt. Br. 5-13; N.Y. Br. 15). Without debating the merits of these various policy arguments,[4] the short answer is that they are properly addressed to Congress. The ADEA has been amended before, and Congress is quite capable of excepting state and local firefighters from its provisions if it is persuaded by these considerations.[5]

3. Respondents' primary submission is that the City of Baltimore has made the evidentiary showing necessary to establish age as a BFOQ for its firefighters. This argument was not passed upon by the court of appeals, and there is no reason for this Court to consider it. As a preliminary matter, respondents argue (Br. 28-33) that the district court

[3]This Court has already explained in some detail the reasons why it "annot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances." *EEOC* v. *Wyoming*, 460 U.S. at 240-242.

[4]It must be remembered, however, that the overriding purpose of the ADEA is to eradicate age discrimination and to promote individualized employment decisions, not to encourage decision making on the basis of age by facilitating use of the BFOQ defense.

[5]Legislation to exempt state and local firefighters and law enforcement officers from the ADEA has been introduced in both the Senate (S. 698, 99th Cong., 1st Sess. (introduced Mar. 20, 1985)) and the House of Representatives (H.R. 1435, 99th Cong., 1st Sess. (introduced Mar. 6, 1985)).

erred in applying the BFOQ test set forth in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which they characterize as "oppressively strict" (Resp. Br. 31). Because the court of appeals found it unnecessary to consider whether the evidence supported a BFOQ finding, it certainly did not address the question of the standard to be applied in assessing such evidence. The question of the correctness of the *Tamiami* test therefore is not presented in this case; as noted in our opening brief (at 19 n.13), in *Western Air Lines, Inc.* v. *Criswell*, No. 83-1545 (argued Jan. 14, 1985), the Court is considering the relevant standard for demonstrating a BFOQ. We note here only that the *Tamiami* test has been universally accepted by the courts of appeals, including the Fourth Circuit, and that Congress apparently has recognized that the *Tamiami* test sets forth the correct analysis for determining whether a BFOQ has been shown (see EEOC Br. 18-21).

By the same token, respondents' argument (Br. 33-48) that, regardless of the proper standard, the evidence presented in this case established age as a BFOQ for Baltimore's firefighters also was not reached by the court of appeals. The argument was unequivocally rejected, however, by the district court, which presided over the trial and heard the evidence. As summarized in our opening brief (at 6-8), the district court found that the evidence showed that Baltimore firefighters, including the individual plaintiffs, historically had served effectively beyond the age of 55 (Pet. App. 40a-42a) and that there were practical ways to deal on an individualized basis with removing employees whose medical condition had deteriorated (*id.* at 42a-49a). And the court of appeals noted that, if it had not ruled that evidence of the necessity for the age limit was irrelevant, it "might well [have been] persuaded by the thorough, impeccably reasoned opinion" of the district court (*id.* at 8a). The place to consider whether the district court's factual findings are

clearly erroneous (see *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985)), is in the court of appeals on remand.[6]

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[6]It is noteworthy, however, that respondents' stated concern for the physical condition of its firefighters (Br. 33-48) apparently begins only when they reach age 55. The Chief of the Baltimore Fire Department testified that it has no physical fitness program (C.A. App. 786). And the record does not indicate that respondents take into account any of the recognized major risk factors for predicting heart disease, such as smoking, high blood pressure, and high cholesterol (see Resp. Br. 45 n.17; C.A. App. 428) in assessing when firefighters should be retired. Thus, under respondents' program, a 55-year-old firefighter in perfect physical condition is apparently deemed more of a threat to the safety of Baltimore's citizenry than a heavy-smoking, overweight 50-year-old firefighter with elevated blood pressure and cholesterol levels and a history of heart disease in his family. Moreover, respondents' assertion that retaining firefighters beyond age 55 is a threat to public safety is further belied by the fact that respondents' own plan allows all lieutenants, who "perform at fires the same duties as firefighters of lesser rank" (Pet. App. 39a n.9), to work until age 65.